

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

'03 FEB 19 PM 12 09

IN RE: COMPLAINT OF US LEC OF)
TENNESSEE, INC. AGAINST ELECTRIC)
POWER BOARD OF CHATTANOOGA)

TN REGULATORY AUTHORITY
DOCKET NO. 02-00562 DOCKET ROOM

RESPONSE TO MOTION FOR SUMMARY JUDGMENT

US LEC of Tennessee, Inc. ("US LEC") submits the following response to the Motion for Summary Judgment filed by the Electric Power Board of Chattanooga ("EPB").

Summary

This is the third time that EPB has tried to avoid an evidentiary hearing on US LEC's complaint. EPB has filed a "Motion in Opposition to Commencement for a Contact Case," a "Motion to Dismiss," and, now, a "Motion for Summary Judgment." Each time, EPB has presented the same arguments. The Hearing Officer has already rejected them twice, ruling that the affidavits filed by EPB in support of its motion to dismiss "could be viewed as nothing more than verified answers to the Complaint" and "raise more questions than they answer." Order Denying Motion to Dismiss and Convening a Contested Case, September 12, 2002, at 8. Nevertheless, relying on those same affidavits, EPB again requests summary relief, hoping to avoid having to file testimony or face cross-examination. Once again, those arguments should be rejected.

Standard of Review

To properly support its motion, the moving party must either affirmatively negate an essential element of the non-moving party's claim or conclusively establish an affirmative defense. See *Staples*, 15 S.W.3d at 88; *McCarley v. West Quality Food Serv.*, 960 S.W.2d 585,

588 (Tenn. 1998). The moving party has the burden of showing the court the basis for his motion and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact. *Byrd v. Hall*, 847 S.W.2d 208, 215 (Tenn. 1993) See also *Keene v. Cracker Barrel Old Country Store, Inc.*, 853 S.W.2d 501, 503 (Tenn. Ct. App. 1992) (citing *Taylor v. Nashville Banner Pub. Corp.*, 573 S.W.2d 476 (Tenn. 1978)). Moreover, the moving party must show the court that he or she is entitled to judgment as a matter of law. *Id.* The evidence must be viewed in the light most favorable to the non-moving party and all reasonable inferences must be drawn in the non-moving party's favor. *Staples v. CBL Associates, Inc.*, 15 S.W.3d 83, 89 (Tenn. 2000). Where there are disputes concerning the material facts or where there is uncertainty as to whether there may be such a dispute, the summary judgment motion should be denied. *Keene*, 853 S.W.2d at 503 (citing *Evco Corp. v. Ross*, 528 S.W.2d 20 (Tenn. Ct. App. 1975)). The summary judgment proceeding is not a substitute for a trial of disputed factual issues. *Id.* As we show below, EPB's motion for summary judgment does not come close to satisfying these standards and, as such, should be denied.

Argument

1. Cross-Subsidization.

US LEC has raised both legal and policy questions about EPB's operations that, the Hearing Officer has ruled, warrant consideration by the Authority in the context of a contested case proceeding. *Id.* The most serious allegation is that EPB is using its electric operations to cross-subsidize its telecommunications division. In violation of both state law and the orders of the TRA, which include a "Code of Conduct" EPB must follow, EPB markets its electric and telephone operations as intertwined, thereby giving EPB Telecom (the telecommunication division) the free use of the good will and reputation of EPB.

US LEC has already provided the Authority with numerous examples of EPB's illegal joint marketing activities. *See* Paragraph 6 of the Complaint and the exhibits attached to the Complaint. In response to US LEC's discovery requests, EPB provided further evidence of those activities. For example, one advertisement (copy attached) states,

"Hear the one about the power company that got into the phone biz? . . . Imagine your phone and power sources coming from one source. We're thinking about EPB, the power company you can expect more from."

At a small business conference in Chattanooga in September, EPB had a large booth at which signs urged customers to "go all electric" while other signs advertised telephone services. EPB made no effort to inform the public of the separate identities of the electric and telecommunications divisions. *See* attached affidavit of Michael G. Moeller. Even today, almost a year after the filing of this complaint, EPB's web page includes statements such as, "Everything we've learned over the years about keeping the lights on . . . has been put to good use in our telecommunications delivery. So you can be sure your phone service will be as reliable as your power service." *See* attached, "Welcome to EPB Telecom."

The "Code of Conduct" adopted by the TRA permits the "joint marketing" of EPB's electric and telephone services "provided that the customer is informed of the separate identities of each [division]."

It is clear that EPB has repeatedly violated this requirement. *See* attached affidavit of Michael G. Moeller. It is also clear that the "Code of Conduct" needs to be strengthened and clarified to prevent EPB Telecom from leveraging the good will and reputation of EPB electric to give EPB Telecom a competitive advantage over other telecommunications carriers. Under T.C.A. § 7-52-402, municipal electric systems are prohibited from subsidizing their telecommunications operations. Through the joint use of the EPB name, the joint marketing efforts which depict EPB's telecommunications and electric divisions as one entity, and the

telecommunications division's efforts to promote sales by emphasizing the good will, history, reputation, and reliability of EPB's electric operations, EPB continues to operate in complete disregard of that statute.

In its "Motion for Summary Judgment," EPB states that there is no evidence of "any improper joint marketing activity" or any indication that EPB has "jointly offered electric and telecommunications service to a prospective customer at any time." Motion at 8. EPB is apparently unfamiliar with its own advertising and marketing efforts or even its own web site. Perhaps EPB believes that the marketing practices described above do not constitute a "subsidy" or are not otherwise "improper." In any event, it is clear that the parties have a vastly different view of both the facts and the law and that this case must proceed to hearing.¹

2. Discrimination in Access to Facilities.

US LEC has also alleged that EPB may have engaged in discrimination and cross-subsidization by allowing its telecommunications division, but not other competing carriers, to use the electric company's building access facilities.

As the Authority is aware, competing local exchange carriers must obtain access to buildings in order to serve customers inside the buildings. This has been a very contentious issue because some building owners and managers require that competing carriers pay access fees, often calculated as a percentage of revenue, in order to gain entrance. As the sole provider of electric service in Chattanooga, EPB already has access to all buildings and pays no access fees. If EPB Telecom is allowed to use those same facilities without having to pay the same building

¹ It is important to note that US LEC's complaint is based, *inter alia*, on both violations of the "joint marketing" provision in the Code of Conduct and on T.C.A. § 7-52-402, which prohibits, with a few exceptions not applicable here, all forms of cross-subsidization. EPB's Motion attempts to limit this issue to a narrow debate over the interpretation of "joint marketing" in the Code of Conduct while ignoring the larger issues of EPB's attempt to subsidize its telecommunications operations by using the good will, name, and reputation of EPB's electric division.

access fees that other CLECs pay, that would give EPB Telecom a significant and unfair competitive advantage over other carriers.

Based on EPB's responses to discovery and the affidavit of Mr. William Chapman (who has recently resigned from EPB), it is still unclear whether or not EPB Telecom is using the facilities of EPB's electric division to gain access to buildings.

In EPB's "Supplemental Response to Discovery," Question 17, EPB distinguished "building entrance facilities" from "conduit," "pole attachments," and other "rights of way and easements." EPB stated that it makes conduit space available to EPB Telecom at a rate of \$2.77 per foot per year and would make the conduit available to any other carrier at the same rate. As for "building entrance facilities," however, EPB stated it "does not give any CLEC, including EPB Telecommunications, the right to use its electric system building entrance facilities."

The Chapman affidavit does not support this conclusion at all. Mr. Chapman states that "in every instance where the Telecommunications Division has gained access to such buildings," the Division has obtained the building owner's permission. Then, having obtained such permission, "the Telecommunications Division has paid EPB to install fiber in conduit that the Telecommunications Division rents from EPB."

Thus, according to Mr. Chapman, EPB Telecommunications does, in fact, use EPB's "conduit" to gain access to office buildings. In other words, Mr. Chapman is apparently using the term "conduit" in his affidavit to refer to building entrance facilities. Those facilities, he acknowledges, belong to EPB's electric division and were, presumably, originally installed for use by the electric division. Now, however, they are being "rented" to the Telecommunications Division.

In summary, there is a very clear discrepancy between Mr. Chapman's affidavit and EPB's earlier statement that no CLEC, including EPB Telecommunications, has "the right to use

EPB electric system building entrance facilities.” As the Hearing Officer noted, EPB’s affidavits “raise more questions than they answer.” In the absence of direct testimony and the opportunity for cross- examination, the record is inadequate to determine exactly how, and at what cost, EPB Telecommunications gains access to office buildings.

3. Compliance with TRA Filing Requirements.

US LEC’s third complaint is that the EPB has not complied with the Authority’s filing requirements. Specifically, the TRA has ordered EPB to conduct annual audits and to file those audits with the Authority. EPB’s Motion for Summary Judgment denies that there is any such filing requirement despite the plain language in the TRA’s Order of May 10, 1999, that “EPB will provide the results of any such audits to the Authority.”

Furthermore, EPB has acknowledged that EPB also failed for more than a year to file its annual report with the TRA for the year ending December 31, 2000, and did not file the following year’s annual report until directed to do so in a letter from the Authority’s Executive Secretary. *See* letter of March 6, 2002 from David Waddell to Harold DePriest. (attached to EPB’s Response to Discovery Requests of US LEC, Question 13). The unexcused delay in failing to file these mandatory annual reports is punishable by a fine of \$50.00 for each day for each report. *See* T.C.A. § 65-4-120.

In its Complaint, US LEC asked, among other things, that the TRA “impose sanctions of any violations” of the TRA’s orders. Complaint at paragraph 9. EPB has failed to timely file its annual reports as required by the Authority’s Order and has also failed to file the audits discussed above. US LEC presumes that the Authority will impose appropriate sanctions just as it has done with other carriers, both large and small, who fail to comply with the Authority’s reporting requirements.

4. EPB’s Refusal to Interconnect.

In September, 2002, US LEC amended its Complaint to allege that EPB had failed to comply with T.C.A. § 65-4-124(a) which requires that all carriers, both incumbents and competing carriers, provide each other "desired features, functions and services promptly, and on an unbundled and non-discriminatory basis" to the extent "technically and financially feasible." US LEC has made such a request of EPB which has ubiquitous access to public rights-of-way, poles, conduits, and building access facilities. In response, Mr. Chapman sent a brief e-mail to US LEC saying, without elaboration, that he did not believe it "feasible" for EPB to provide any wholesale services to US LEC.

In the Motion for Summary Judgment, EPB argues that (1) T.C.A. § 65-4-124(a) is preempted by the federal Telecommunications Act; (2) US LEC's complaint should be considered rulemaking rather than in a contested case proceeding; and (3) the only "evidence" offered by US LEC (the Chapman e-mail) shows that it is not financially feasible for EPB to comply with US LEC's request.

All three arguments are frivolous and can be readily dismissed. First, Section 251 of the federal Act applies only to incumbent carriers. It does not address one way or the other the unbundling obligations of competing local exchange carriers. Moreover, 47 U.S.C. § 251(d)(3) specifically authorizes states to "establish access and interconnection obligations" of all local exchange carriers, both ILECs and CLECs, as long as those obligations are "consistent with the requirements of this section." There is nothing inconsistent between the federal statute, which applies to ILECs, and state law, which applies the same requirements to all local carriers.²

² EPB also cites FCC Rule 47 CFR § 51.223 which prohibits a state from imposing unbundling obligations on CLECs without FCC approval. EPB fails to mention part (b) of the rule which says, "A state commission . . . may request that the Commission issue an Order declaring that a particular LEC . . . be treated as an incumbent LEC" for purposes of unbundling. Therefore, if the TRA agrees with US LEC that EPB should make its network elements
(footnote continued on following page ...)

EPB's argument that this issue should be addressed in a rulemaking is equally flawed. US LEC has made no such requests of any CLEC other than EPB. Under the statute, US LEC has the right to make the request and EPB has the obligation to comply. No other carriers are involved. While the outcome of this case would presumably set a precedent for other, similar complaints, the same could be said of any carrier-to-carrier complaint proceeding.

EPB's third argument is merely an attempt to shift the burden of proof from EPB to US LEC. It is EPB's legal responsibility to prove that compliance with the statute is not "financially feasible." It is not US LEC's obligation to prove otherwise. EPB will have to produce more than the vague, two-sentence e-mail of a former employee to excuse its failure to comply with US LEC's request.

5. MetroNet.

In responding to US LEC's discovery requests, EPB has acknowledged that MetroNet, Inc. is a hybrid entity that uses "the authorization of EPB to provide Internet service" but is also "designed to be an economic development arm of the City of Chattanooga." Supplemental Response to US LEC Request No. 19. News articles previously submitted by US LEC indicate, however, that MetroNet will offer not just ISP service but high-speed transmission services that can be used by internet service providers or by other businesses for point-to-point data transmission.³ In other words, it appears that MetroNet now intends to offer regulated, telecommunications services both to ISPs and to end-users in the Chattanooga area.

(... footnote continued from previous page)

available to competitors, the TRA will presumably make such a request of the FCC. Given the incumbent-like advantages of a municipally owned telephone system, such a request would make both legal and logical sense.

³ As the Hearing Officer has already concluded (Order of December 6, 2002, at 6), "The Hearing Officer finds that US LEC has alleged sufficient facts that could render MetroNet a provider of telecommunications services (and thus a "public utility") subject to the Authority's jurisdiction."

If that is the case, MetroNet cannot be subsidized by the City of Chattanooga nor can MetroNet be used as an "economic development" tool without violating the statutory prohibition against cross-subsidization. EPB, not MetroNet, is authorized to provide telecommunications services in Chattanooga. EPB's telephone operations can not be subsidized, directly or indirectly, by the city. If MetroNet is offering telecommunications services using the certified authority of EPB, MetroNet is subject to the same restrictions and prohibitions as EPB. Furthermore, as the Hearing Officer has already noted, to the extent MetroNet plans to offer regulated telecommunications services under the authority of EPB, "it would be necessary for the Authority to determine whether Tenn. Code Ann. § 7-52-401 requires Authority approval of such a relationship."

While it is unclear from the current record exactly what services MetroNet intends to offer, these facts will presumably be developed in testimony and cross-examination at a hearing. But as the Hearing Officer has previously recognized, the creation and operation of MetroNet and its relationship to EPB raise legitimate legal and regulatory issues which the TRA may well need to address. Given these uncertainties, it would be inappropriate to grant EPB's motion.

Conclusion

For these reasons the Motion for Summary Judgment should be denied.

Respectfully submitted,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: 

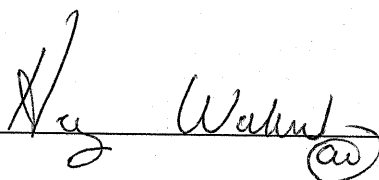
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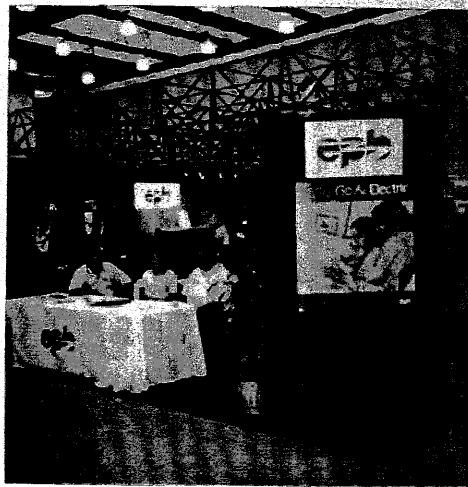
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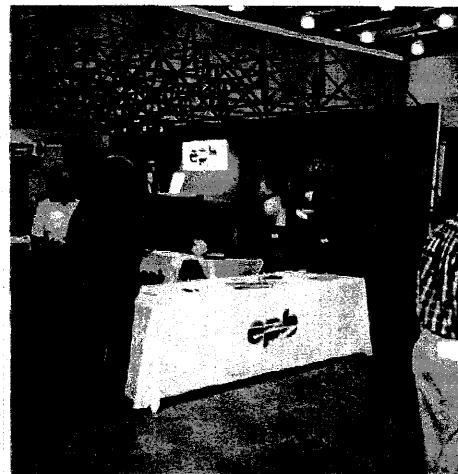
I hereby certify that a true and correct copy of the foregoing has been forwarded via U.S. Mail, postage prepaid, to the following on this the 19th day of February, 2003.

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Affidavit of Mike Moeller

My name is Michael G Moeller. I am the VP of Sales for TN and KY for US LEC of Tennessee, Inc.. I am responsible for the sales teams in 5 markets and in addition have been acting as Sales Director in Chattanooga since Oct 2001. On September 26, 2002, I attended the Small Business Expo in Chattanooga, TN. EPB had the largest booth at the trade show which was at the center of the show area. The main signs and labeling for the booth was "EPB" in the form of their logo (see pictures). The booth had a mix of power and telecom equipment, power and telecom marketing banners (information boards). There was no clear distinction between EPB Power and EPB Telecom within the booth. The main banners made it very clear that this was an EPB booth (no mention of EPB Power or EPB Telecom), just EPB.

Furthermore, I have been personally present on several occasions in which representatives of EPB Telecom represent themselves as being from EPB and state that "we have been around for seventy years."

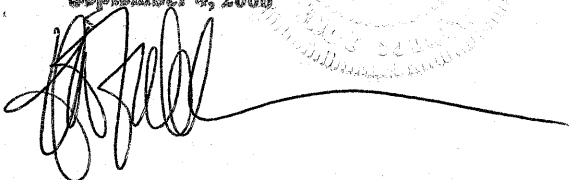
In addition, several telecommunication prospects and customers have stated to me that EPB has been around for 70 years. Some have even stated that EPB has the money they need since they are the power company and they said that the CLECs are going out of business. In my opinion, they were trying to give the impression that EPB's telecommunications services are offered by the same entity that provides electric services.

I believe that EPB purposefully confuses the market, customers and the general public of EPB Telecoms background. This is clearly seen the newspaper articles on telecom or internet in which the name "EPB" is interchanged with EPB Telecom.

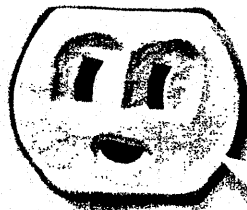


Mike Moeller
US LEC
VP of Sales – TN

MY COMMISSION EXPIRES:
September 4, 2006



HEAR THE
ONE ABOUT THE
POWER COMPANY
THAT GOT INTO
THE PHONE
BIZ?





YEAH.
AT FIRST PEOPLE
WERE SHOCKED.
THEN THEY
COULDN'T STOP
TALKING.

Imagine your phone and power services coming from one source.
We're thinking about it. EPB — the power company you can expect more from.

Now
ELECTRIC POWERBOARD






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Mission

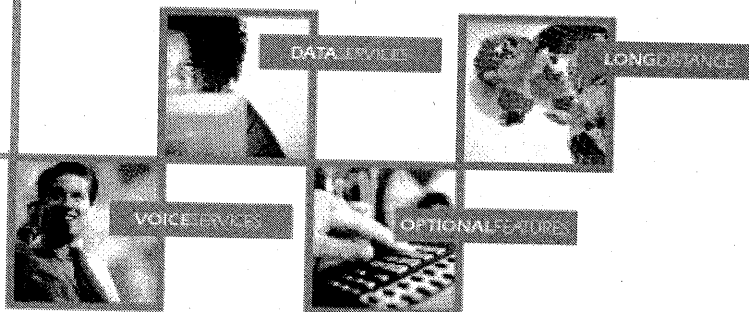
EPB was founded to ensure the availability of reliable, low-cost electric power service for Chattanooga area residents, industry and businesses. But with deregulation around the corner, EPB is becoming more than a power company. We're becoming a powerful company--an innovative, progressive company you can depend on for a wide range of reliable, affordable services. But whether you have electric, telecommunications or other services from EPB, one thing will never change--the way we've always put the needs of our customers first. It's a way of doing business that's served us well for more than six decades--a philosophy which is, indeed, more current than ever.



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CUSTOMERSERVICE
WHAT OUR CUSTOMERS
ARE SAYING
EMPLOYMENT
CONTACTUS



WELCOME TO EPB TELECOM™

Now you can expect more from a business phone service. More flexibility, more simplified billing and more savings. All with the kind of responsiveness and reliability you can only get from a business that's just down the street. And all for just one low, flat rate that's probably less than you're paying now. Give us your last phone bill and we'll prove it by generating a price comparison for the same service with us.

SAVINGS

Today, most telecommunications providers don't make low prices a high priority. But we do. In fact, we can usually deliver service at prices that are lower than those of the national providers — sometimes much lower. Don't take our word for it though. Let us prove it. Give us your most recent phone bill and we'll generate a price comparison for the same service with us. Then judge for yourself.

NO EXTRA CHARGES, OR HIDDEN FEES

One low, flat rate. That's it. That's all you'll find on your monthly statement. No access fees. No hidden charges. No surprises. Period.

EASY BILLING

Understanding your phone statement each month shouldn't be work. That's why we consolidate your local, long distance and other telecommunications services you choose into one simple, easy-to-read billing statement.

FLEXIBILITY

Nothing's worse than having to choose service packages that give you more or less than you need. With EPB Telecom you choose exactly the services that meet your needs. Whether it's one business line or a hundred lines, local service or worldwide long distance, scalable broadband solutions, trunk services with direct inward dialing, PRI or features like voice mail, calling cards and call forwarding, the list is endless and so are your choices.

RESPONSIVENESS

There are people at the end of our lines. People who know you by name — not account number. But more importantly, you will always have a dedicated local service team to take care of your business needs. If you have questions or need to talk to someone, we can be in your office in the time it takes to drive across town.

RELIABILITY

When it comes to providing reliable electric power service, EPB is one of the leading utilities in the country. And EPB Telecommunications is no different. Everything we've learned over the years about keeping the lights on — including redundant outage prevention systems, automated restoration systems and maintaining a crack linemen crew — has been put to good use in our telecommunications delivery. So you can be sure your phone service will be as reliable as your power service. And that's saying something.

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